IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No._____

HUMBLE OIL & REFINING COMPANY, *Petitioner*,

v.

EIGHTH REGIONAL WAR LABOR BOARD, ET AL., *Respondents*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

POINT I

(Related to First and Second Reasons why the writ Should be granted.)

Parties to a conspiracy who are within the jurisdiction of a court of equity are subject to the injunctive

restraints of the court where their principals and the chief source of their mischief are beyond the jurisdiction of the court.

In its opinion in this case, the Circuit Court of Appeals disposed of the whole suit by holding that the Texas defendants had to be *principal actors* before an injunction could issue against them and others in "active concert or participation" with them.

In connection with its holding, the Circuit Court cited no authority except a reference to the case of OSBORN v. BANK OF UNITED STATES, 9 WHEAT. 738, 6 L. Ed. 204. Not only does that case fail to support the Circuit Court's holding, but it holds *directly to the contrary*. The *sharp conflict* between the Circuit Court's holding in our case, and the holding of this Honorable Court in the OSBORN case can be readily seen when the language is contrasted. Here is the parallel:

The Supreme Court in OSBORN v. BANK OF UNITED STATES:

"* * * if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong, which they would afford against him, could his

The Circuit Court in the case at bar:

"The party defendant to the injunction proceedings must be a principal actor before an injunction may issue against him and others in 'active concert or participation' with him."

principal be joined in the suit." (6 L. Ed., local cit., p. 229.)

" * * * No plausible reason suggests itself to us for the opinion that an injunction may not be awarded to restrain the agent with as much propriety as it might be awarded to restrain the principal, could the principal be made a party." (6 L. Ed., local cit. 229.)

Not only is the holding of the Circuit Court contrary to this Court's holding in the OSBORN case, but it is likewise contrary to the holdings of this Honorable Court in other leading cases. With the very question before it which is of controlling importance here, this Honorable Court has uniformly rejected the view announced by the Circuit Court in its decision of our case—this being apparent from the further contrast:

Outstanding cases by this Supreme Court:

"The object of the bill is to restrain an individual from doing acts that it is alleged that he has no authority to do and that derogate from the quasi sovereign authority of the state. *There is no question that a bill in equity is a proper remedy, and that it may be pursued against the defendant* (the Director of the National Park Service, a

re ident of Colorado) *without joining either his superior officers* (the Secretary of the Interior, a resident of Washington, D. C.) *or the United States.*" (Citing cases.) COLORADO v. TOLL, 268 U.S. 228, 69 Law. Ed. 927.

"If the conduct of the defendant constitutes an unwarrantable interfe r e n c e with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. (Citing cases.) *And in the case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments.* (Citing cases.) *And it is equally applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred.*" (Citing cases.) PHILADELPHIA v. STIMSON, 223 U.S. 605, 56 Law. Ed. 570.

The Circuit Court's holding in our case repeated:

"The party defendant to the injunction proceedings must be a principal actor before an injunction may issue against him and others in 'active concert or participation' with him."

To the same effect is GOLTRA v. WEEKS, 271 U.S. 536, 70 L. Ed. 1074. We respectfully request the Court's close attention to the decision in that case, because it is by two of the great early judges of this Court and announces sound principles of law with which the holding of the Circuit Court of Appeals in the instant case is in sharp conflict.

In the case of AMERICAN SCHOOL OF MAGNETIC HEALING v. MCANNULTY, 187 U.S. 94, 47 Law. Ed. 90, suit was brought in the Circuit Court for the Western District of Missouri to enjoin a local Postmaster from carrying out an illegal unauthorized order of the Postmaster General. The Circuit Court sustained a demurrer to complainant's bill. Upon appeal, in reversing the order of the Circuit Court, this Honorable Court held:

> *"The Postmaster General's order, being the result of a mistaken view of the law, could not operate as a defense to this action on the part of the defendant, though it might justify his obedience thereto until some action of the court.* In such a case as the one before us there is no adequate remedy at law, the injunction to prohibit the further withholding of the mail from complainants being the only remedy at all adequate to the full relief to which the complainants are entitled. * * *.
>
> " * * * we are constrained to reverse the judgment of the circuit court, with instructions to overrule the defendant's demurrer to the amended bill, with leave to answer, *and to grant a temporary injunction* as *applied for by complainants*, * * * ." 47 Law Ed., local cit. 97.

That the holding of the Circuit Court of Appeals in this case is contrary to its own prior decisions is demonstrated conclusively by two well considered cases by the Fifth Circuit, in each of which that court passed upon the identical question which controls our case. Here are their earlier holdings, contrasted with that in the case at bar:

"The Secretary of the Interior is not personally doing or threatening the acts of trespass and of prosecution which are sought to be enjoined. *Although the actors may be authorized and incited by him so that he would be a proper codefendant if he were within the court's reach, the court has power to stop the trespassing by those within its jurisdiction irrespective of their claim that they were acting for others.* (Citing cases.) This is not a bill to cancel the Secretary's Regulations, but only to test their efficacy to protect defendants in their alleged trespasses against complainant's rights. There is no more need to make the Secretary a party for this purpose than to make the President a party because he promulgated the Code or the Congress because it enacted the statute." RYAN v. AMAZON PET. CORP., 71 Fed. (2d) 1, reversed on another point, 293 U.S. 338, 79 L. Ed. 446.

"We agree at once that the Secretary not being before the court, could not be enjoined from enforcing his regulations. (Citing cases.) But, *if those regulations are indeed invalid, the control*

Again the holding of the Fifth Circuit Court in disposing of our case is repeated:

"The party defendant to the injunction proceedings must be a principal actor before an injunction may issue against him and others in 'active concert or participation' with him."

committee cannot shield themselves behind the Secretary, or compel compliance therewith in his name. Colorado v. Toll, 268 U.S. 228, 45 S. Ct. 505, 69 L. Ed. 927. *It follows that the Secretary was not an indispensable party.*" YARNELL v. HILLSBOROUGH PACKING CO., 70 Fed. (2d) 435.

The same *irreconcilable conflict* exists between well-considered opinions by other Circuit Courts of Appeals and the decision of our case by the Court of Appeals for the Fifth Circuit. The holdings in three such cases are used to further illustrate the sharp contrast:

"Where the act complained of is not authorized by statute, or where the statute authorizing it is void because in conflict with some provision of the Constitution, the person attempting it may be restrained in a proper case, notwithstanding his claim that he is acting in his official capacity. In such case he is acting, not within the law, but outside it, his act is not the act of the government, and the law affords him no protection for what he is doing or is about to do. *This is true, whether he be the head of a department or merely a subordinate acting under orders; and if a subordinate, there is*

At the risk of appearing monotonous, we reiterate the holding by which the Court of Civil Appeals for the Fifth Circuit disposed of this case:

"The party defendant to the injunction proceedings must be a principal actor before an injunction may issue against him and others in 'active concert or participation' with him."

no necessity of joining as defendant the head of the department because the orders of the head are immaterial if the act sought to be enjoined is not authorized by law. Colorado v. Toll, supra." FERRIS v. WILBUR, 27 Fed. (2d) 262.

"A suit to enjoin the defendant from doing that which the law authorized him to do would be, in effect, a suit against the United States. *A suit to enjoin him from doing a thing which was unlawful and unauthorized, would not be a suit against the United States, but a suit against the defendant as to individual, and it would be unnecessary to join any other party.*" NOCE v. MORGAN & Co., 106 Fed. (2d) 747.

"Appellants' next contention is that the Secretary of Agriculture is an indispensable party to this action. The appellees are not seeking to establish their title to anything other than their right to conduct their business under the constitutional guarantee of freedom of the right to contract. *The actions of the appellants who were seeking to carry out the regulations of the Secretary are not*

authorized by the act of Congress. The appellees are not engaged in 'interstate commerce,' and as to them the actions of the appellants constitute trespass. Under such circumstances the appellants cannot shield themselves behind the unauthorized regulations. The Secretary is not a necessary party." BERDIE v. KURTZ, 75 Fed. (2d) 898.

It is clear from these and a number of other decisions of this Honorable Court and of the various Circuit Courts of Appeals that parties to a conspiracy who are within the jurisdiction of the court are subject to the injunctive restraint of a court of equity, even though their principals, the chief source of the mischief, are beyond the jurisdiction of the court, and that is true even though the resident conspirators are acting under orders from the nonresident conspirators. The decision of the Circuit Court of Appeals in the instant case is contrary to well-established principle, and is, therefore, wholly untenable.

Furthermore, the holding of the Circuit Court of Appeals is contrary to the provisions of Section 383, Title 28, U.S. C.A., which provides:

> "Every order of injunction * * * shall be binding * * * upon parties to the suit, their officers, agents, servants, employees and attorneys, or those in active concert or participation with them, and who shall, by personal service or otherwise, have received actual notice of the same."

Rule 65 (d) of the RULES OF CIVIL PROCEDURE contains the identical provision.

Under the plain terms of the Statute and Rules, an injunction order is binding upon both principal and agent, master and servant, employer and employee, as well as all other persons "in active concert or participation" with the parties to the suit, provided only that such persons receive actual notice of the injunction order.

The Texas defendants were properly before the Court as parties. Each and all of them were properly served with process within the territorial limits of the State of Texas. Petitioner's bill alleged, the uncontroverted evidence showed, and the trial court found, that they were engaged "in concert" in the carrying out and furtherance of the entire conspiracy directed against petitioner. Undoubtedly, they were agents of and actively coöperating with the Washington defendants in the furtherance of the conspiracy (R. 371).

It is, therefore, apparent that the holding of the Circuit Court of Appeals that the preliminary injunction should be dissolved against the Texas defendants is contrary to the provisions of Section 383, Title 28, U. S. C. A., and Rule 65 (d) of the RULES OF CIVIL PROCEDURE, and leading authorities on the subject.

Public Importance

(Related to the Third Reason why the writ should be granted.)

In its efforts to protect its property from injury and seizure by governmental officers acting *without any semblance of legal right*, petitioner is clearly entitled to have the benefits of legal principles long established and followed by our courts. Petitioner has the undoubted right to have applied to this case the Statute (Section 283) and Rule 65(b) which the Circuit Court has disregarded in dissolving the preliminary injunction granted by the trial court.

But above and beyond petitioner's rights is the *great public importance* of the question involved in this case.

It is important to the Bench and Bar of America to eliminate the conflict between the Circuit Court's opinion in this case, and all the other authorities on this vital matter of courts of equity restraining wrongdoers acting in concert, pursuant to a common design.

Of equal—or perhaps far greater—public importance are the grave consequences which flow from persons in official positions *misusing and abusing* their places and vast powers to harass law-abiding citizens into submision to the fiat of the official—which in this case is *clearly contrary to law.*

The suggestion may be made that the activities of the defendants complained of was in anticipation of some kind of an order which the President might at some time in the future issue. The only Congressional authority on this subject is Section 9 of the SELECTIVE SERVICE AND TRAINING ACT, as amended by the WAR LABOR DISPUTES ACT (Title 50, Sec. 1503, U. S. C. A.). Under that Act the President is authorized to take over a war plant whenever he "finds, after investigation, and proclaims that there is *an interruption of the operation* of such plant, mine or facility as a result of a strike or other labor disturbance, * * * " and that such action is necessary in order to avoid impeding the war effort. The pleadings of petitioner alleged, the undisputed evidence showed, and the Court found that there had been *no actual or threatened interruption of operations* at the Ingleside Refinery. The statutes referred to confer no power upon any of the defendants to seize petitioner's refinery and the defendants in their brief in the Circuit Court denied that they were acting under instructions or orders from the President to seize the refinery.

Apparently recognizing the lack of any authority in the President, or the defendants as his agents and representatives, to impose sanctions and penalties or to take over the Ingleside

Refinery for the purpose of enforcing the order of the National War Labor Board, defendants may suggest that the President as Commander-in-Chief has power to seize private property under the Constitution, and that such power is separate and distinct from, and in addition to, that which has been expressly conferred upon him by Congress. That a state of war does not suspend the 5th Amendment to the Constitution, or authorize the President to confiscate property or deprive citizens of their property without due process and just compensation, is clear from the following authorities: Ex Parte Milligan, 18 L. Ed. 296; German Saboteur Cases, 87 L. Ed. 1; Fleming v. Page, 13 L. Ed. 276, 280; Japanese Curfew Cases, 87 L. Ed. 1774; 67 Corpus Juris 366; L. P. Stewart and Bro. v. O. P. A., 88 L. Ed. 1051.

The trial court expressly found that *all* of

> "the defendants, acting in concert, have conspired to enforce said directive order of the National War Labor Board, and for that purpose have applied sanctions against plaintiff, and have expressed an intent to seize and have threatened to seize possession of and take over and operate plaintiff's Ingleside Refinery * * * " (R. 352).

The Circuit Court of Appeals has not found contrary to that finding of the trial court—as indeed, it *could not do* in view of the *undenied facts and matters* set forth in petitioner's bill. Petitioner's bill made out a strong case of conspiracy among *all* of the defendants; the defendants *made no denial of or other answer* to the allegations contained in the bill; and the trial court heard evidence and expressly found that the proof introduced by petitioner amply supported its bill (R. 351-2).

Law-abiding citizens have the right to know that they and their property will be protected by the courts from unlawful

and unauthorized encroachments, trespasses and interferences by government officials, or otherwise. The legal principles long announced and followed by this Honorable Court and the various Circuit Courts of Appeals have assured citizens that they and their property are free from such unauthorized and unlawful encroachments, trespasses and interferences. The decision of the Circuit Court of Appeals in this case is contrary to those principles, and it is of the greatest public importance that this Court review the decision of the Circuit Court of Appeals with a view to conforming it with those great, equitable and democratic principles.

POINT II

(Related to the Fourth Reason why the writ should be granted.)

The Circuit Court of Appeals erred in dissolving the preliminary injunction issued by the trial court against the Texas defendants, since the undenied allegations in petitioner's bill and the uncontroverted evidence established that the Texas defendants were acting in concert with the Washington defendants in a conspiracy directed against petitioner.

The trial court had before it clear and pointed allegations of facts and matters in petitioner's bill, *which were undenied* by any defendant. After a full hearing, the trial court found from *uncontroverted evidence* that *all* of the defendants were engaged in the execution and furtherance of a conspiracy directed against petitioner, and that they were actually inflicting and threatening to inflict further irreparable injuries upon petitioner (R. 351-353).

Under well-established rules of law announced and uniformly followed by this Honorable Court and the various Circuit Courts of Appeals, each party to a conspiracy is liable

and responsible for *all* acts done in carrying out the conspiracy. McCANDLESS v. FURLAUD, 296 U.S. 140, 80 L. Ed. 121; SCOTT v. SANDERS, 290 Fed. 30.

In the McCANDLESS case, this Court held, at page 133 of 80 Lawyers' Edition:

> "The respondents make the point that Maxime Furlaud is not subject to personal liability for wrongs committed by the Furlaud Company or Kingston. He was the head and front of the conspiracy. *For anything done in fulfilment of the common purpose either by himself or by any of the corporations dominated by him, he and his confederates are liable in solido.* Mack v. Latta, 178 N.Y. 525, 532, 71 N.E. 97, 67 L.R.A. 126; Anderson v. Daley, 38 App. Div. 505, 56 N.Y.S. 511; 159 N.Y. 146, 53 N.E. 753; Irving Trust Co. v. Deutsch (C.C.A. 2d) 73 F. (2d) 121, 123; Jackson v. Smith, 254 U.S. 586, 589, 65 L.Ed. 418, 424, 41 S. Ct. 200."

In the SCOTT case, the Circuit Court of Appeals for the Sixth Circuit held:

> "The allegations of the petitioner are given at length in the statement of this case. It is sufficient, therefore, to call attention to the fact that it was averred in the petition that the administrator, John S. Wilson, the widow, Clara M. Saunders, R. W. Healey, and the Struthers Savings & Banking Company *entered into a fraudulent collusion and conspiracy* to defraud the estate of Robert M. Saunders, deceased, and to defraud the plaintiff, the mother of the defendant, of her distributive share of that estate, and that by reason of this fraudulent collusion and conspiracy the Struthers Savings & Banking Company came into possession of $25,000 belonging to the estate of Robert M. Saunders, substantially one-half of which the plaintiff was entitled to receive as her distributive share of her son's estate; * * * The District Court specifically found these allegations to be true, and the evidence fully sustains these findings. *It follows,*

therefore, that Helen M. Saunders, the mother of the deceased, could have maintained an action at law against either one of the wrongdoers who entered into this conspiracy and collusion, without joining any of the other parties thereto."

Many more decisions of this Court and the various Circuit Courts of Appeals hold that liability of parties engaged in the furtherance of a conspiracy is both joint and several, and that an injured party may proceed against all or any one or more of such parties. The principles are so well known that additional authorities are thought unnecessary.

The Texas defendants were operating as "one of the arms" of the Washington defendants in carrying out the conspiracy. At the time of the filing of petitioner's bill the Texas defendants had already committed acts within the Northern District of Texas under direct instructions from the Washington defendants, and it was shown they were threatening to commit further acts. All of the defendants admitted in open court that these acts were illegal and unauthorized. The trial court found, from the uncontroverted evidence that such acts were part of the over-all conspiracy among *all* of the defendants and that they were inflicting irreparable injury upon petitioner. *No defendant made any denial or other answer to the merits,* and the most significant statement from them was by their attorney in open court that petitioner's refinery *"might or might not" be seized.*

POINT III

(Related to the Fifth Reason why the writ should be granted.)

The preliminary injunction order was not a mandatory injunction to control the official conduct of defendants, as was held by the Circuit Court of Ap-

peals. It merely restrained defendants from doing that which they admitted they had no authority to do, and which was inflicting irreparable injury on petitioner.

The Circuit Court of Appeals held in this case that

> "An order directing the Regional Board and its members to refrain from failing to process Form 10 applications filed by appellee was equivalent to a mandatory injunction to control their official conduct."

That holding is clearly and grossly erroneous. The trial court merely restrained defendants from doing that which *they admitted they had no legal right or authority to do,* namely, to continue to harass petitioner in their efforts to coerce it into a contract which no one had any legal right to impose upon it. By no stretch of the imagination, could the court's order be construed to compel the Texas defendants to *approve* the applications. Not a word in the injunction indicates that any of the defendants were to take any *particular action* on any of the applications—and all the defendants were left entirely free to approve or *disapprove* any or all of the applications.

Defendants came into court and *admitted* that they had *no legal right or authority* to refuse to *pass upon* (process) petitioner's applications for wage adjustments for its employees because of petitioner's refusal to comply with the maintenance of membership order of the National Board. What petitioner was seeking, and what the trial court did in issuing the injunction order, was to prevent the defendants from doing that which they had *no lawful right or authority* to do, and which was a part of the acts which had been performed and were being performed in the furtherance of the conspiracy among *all* of the defendants.

This Court and the various Circuit Courts of Appeals have

long held that an injunction order to prevent Government officials from carrying out *unauthorized* acts does not amount to a control of their official conduct" or interfere with their official discretion. PHILADELPHIA CO. v. STIMSON, 223 U.S. 605, 56 L. Ed. 570; EX PARTE YOUNG, 209 U.S. 123, 52 L. Ed. 714; GREEN v. LOUISVILLE & I. R. CO., 244 U.S. 499, 61 L. Ed. 1280; YARNELL v. HILLSBOROUGH PACKING CO., 70 Fed. (2d) 435; NOCE v. EDWARD E. MORGAN CO., 106 F. (2d) 746; BERDIE v. KURTZ, 75 Fed. (2d) 898.

In the PHILADELPHIA CO. case, this court held, at page 577 of 56 LAWYER'S EDITION:

> "The complainant did not ask the court to *interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made.* The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States."

In the EX PARTE YOUNG case this court held, at pages 728 and 729 of 52 LAWYER'S EDITION:

> "In our view there is no interference with his discretion under the facts herein. There is no doubt that the court cannot control the exercise of the discretion of an officer. It can only direct affirmative action where the officer having some duty to perform not involving discretion, but merely ministerial in its nature, refuses or neglects to take such action. In that case the court can direct the defendant to perform this merely ministerial duty. Board of Liquidation v. McComb, 92 U.S. 531-541, 23 L. Ed. 623-628.
>
> "*The general discretion regarding the enforcement of the laws when and as he deems appropriate is not interfered with by an injunction which restrains the state officer from taking any steps towards the enforcement of an unconstitutional enactment, to the injury of*

> *complainant. In such case no affirmative action of any nature is directed, and the officer is simply prohibited from doing an act which he had no legal right to do. An injunction to prevent him from doing that which he has no legal right to do is not an interference with the discretion of an officer.*"

To the same effect is GREEN v. LOUISVILLE & I. R. Co., 244 U.S. 499, 61 L. Ed. 1280.

In the YARNELL case the Circuit Court of Appeals for the Fifth Circuit held:

> "Appellees attack the control committee's orders as being null and void, and so they had the right to apply to the court for relief in the first instance. Euclid v. Ambler Co., 272 U.S. 365, 386, 47 S. Ct. 114, 71 L. Ed. 303, 54 A.L.R. 1016."

To the same effect are: NOCE v. EDWARD E. MORGAN & Co. (C.C.A. Eighth), 106 Fed. (2d) 746, 749; BERDIE v. KURTZ (C.C.A. Ninth), 75 Fed. (2d) 898, 905.

The Circuit Court of Appeals in the instant case held contrary to the above decisions in holding that the injunction order was "equivalent to a mandatory injunction to control" defendants' "official conduct." No Government official has the discretion to perform arbitrary, capricious, unlawful or illegal acts that inflict irreparable injury upon a citizen or his property. When such an official acts outside the scope of his authority he ceases to act as a Government official and acts solely as an individual.

POINT IV

(Related to the Sixth Reason why the writ should be granted.)

The District Court properly determined petitioner's

right to a preliminary injunction on the basis of facts existing on the date its bill was filed and the Circuit Court of Appeals erred in dissolving the injunction on the basis of facts supposed to have arisen after the bill was filed and temporary restraint granted by the trial court.

The Circuit Court of Appeals placed great stress upon facts and conditions which were brought into existence by defendants *after* petitioner's bill was filed. One of such facts was the National War Labor Board's ordering the Regional Board to begin passing upon petitioner's Form 10 applications. The defendants admitted that their refusal to process such applications was unlawful and unauthorized. They did not deny that they had imposed sanctions and penalties upon petitioners—indeed, they *frankly admitted it,* and boldly asserted that they were without authority to impose such sanctions and penalties upon petitioner because of its refusal to comply with the National Board's order or for any other reason. The National Board did not order the Regional Board to begin processing the applications until *after* petitioner's bill was filed and temporary restraint was granted.

The action of the Circuit Court of Appeals in determining petitioner's right to the injunction on the basis of facts brought about by defendants after the suit was filed and temporary restraint granted, is contrary to the decisions of long standing of this Court and the various Circuit Courts of Appeals. On a hearing for temporary injunction, all the trial court should consider are the pleadings of the parties and the proof offered in support thereof. The court should not consider facts or conditions that occurred or came into existence after the date of filing the bill, *especially where such facts and conditions are brought about by the parties against whom the injunction is sought.*

None of the defendants filed any answer to the merits of petitioner's bill. Petitioner's bill made out a strong case showing a conspiracy among *all* of the defendants, and alleging acts already committed and about to be committed that were resulting and would further result in irreparable injury to petitioner. The proof offered by petitioner at the show-cause hearing amply supported petitioner's allegations in its bill, and this proof was uncontroverted by any of the defendants. On the basis of the facts as they were alleged in the bill and supported by the proof—and particularly in view of the position of defendants' attorneys in open court that the defendants "might or might not" seize petitioner's refinery—the trial court properly and providently determined that a preliminary injunction should issue. The action of the Circuit Court of Appeals in considering facts other than those that were in existence and set out in petitioner's bill, is erroneous and contrary to well established pronouncements of this Court and the Circuit Court of Appeals.

Alabama v. U. S., 279 U.S. 228, 73 L. Ed. 675;
Swift & Co. v. U. S., 276 U.S. 311, 72 L. Ed. 587;
Goshen Mfg. Co. v. Hubert A. Myers Mfg. Co., 242 U.S. 202, 61 L. Ed. 202;
Rogers v. Hill, 289 U.S. 582, 77 L. Ed. 1385;
International Brotherhood of Teamsters v. U. S., 291 U.S. 293, 78 L. Ed. 804;
Fleming v. Jacksonville Paper Co., 128 Fed. (2d) 395;
Douglas v. Pan-American Bus Lines, 81 Fed. (2d) 222;
Sears, Roebuck & Co. v. Federal Trade Commission, 258 Fed. 307;
Walling v. Reid, 139 Fed. (2d) 323.

In the ALABAMA case, this Court held at page 677 of the LAWYERS EDITION:

"The duty of this court, therefore, upon an appeal

from such an order, at least generally, is not to decide the merits but simply to determine whether the discretion of the court below has been abused."

In the SWIFT & Co. case, the defendants, in asking that an injunction be dissolved, declared that at the time of the hearing in the trial court and before the decree was entered, the controversy had ceased and no illegal acts had been committed. In that connection this Court held at page 597 of 72 LAWYERS EDITION:

"The argument ignores the fact that a suit for an injunction deals primarily, not with past violations, but with threatened future ones; and that an injunction may issue to prevent future wrong, although no right has yet been violated. * * * "

In the GOSHEN MFG. CO. case, the defendant alleged and proved that six months prior to the date of the filing of the bill it had sold its factory, wound up its business and had no intention of reassuming its activities. Throughout the intervening period, and also in answer to the bill, defendant attacked the validity of a certain patent and the right of the complainant to compel desistance. This Court held that such conduct was sufficient to support the issuance of an injunction since

" * * * the means (were) retained of further infringement * * * . We regard this conduct as a *continuing menace*, and we think complainant had a right to arrest its execution * * * . In other words, further infringement was in effect threatened and could be *reasonably apprehended*."

In the instant case, defendants did not promise to desist from imposing further sanctions and penalties on pe-

titioner and merely stated that the Ingleside Refinery "might or might not" be seized.

In the TEAMSTERS case there was involved a combination among wholesalers of poultry to increase the prices and monopolize trade in poultry alleged to be a conspiracy in violation of the Sherman Anti-Trust Act. An injunction was issued to prevent further violations of the Act. On appeal the contention was made that the injunction was improvidently issued because the conspiracy had been abandoned before the commencement of the suit. In that connection, this Court held at page 809 of LAWYERS EDITION:

> "Appellants' contention that the proof shows that they abandoned the conspiracy before the commencement of this suit cannot be sustained.
>
> "The conspiracy was not for a temporary purpose but to dominate a great and permanent business. It was highly organized and maintained by the levy, collection and expenditure of enormous sums. In the absence of definite proof to that effect, ***abandonment will not be presumed***. Hyde v. United States, 225 U.S. 347, 369, 56 L. Ed. 1114, 1127, 32 S. Ct. 793, Ann. Cas. 1914A 614; Nyquist v. United States (C.C.A. 6th), 2 F. (2d) 504, 505. The Government introduced substantial evidence which uncontradicted and unexplained tends to show that the conspiracy and appellants' participation continued until the filing of the amended complaint. They were present in court but failed to testify in their own defense. It justly may be inferred that they were unable to show that they had abandoned the conspiracy and did not intend further to participate in it. Under the circumstances of this case their silence rightly is to be deemed strong confirmation of the charges brought against them. * * * "

In the FLEMING case, the Circuit Court of Appeals for the Fifth Circuit held:

"Injunction is here, as it usually is, in the discretion of the court. *This case is not one where the violations were dead issues at the filing of the suit; nor was cessation entirely voluntary, but was the result of recent official pressure.* And Jacksonville Paper Company and the Administrator *were still at serious issue* as to some applications of the law. The District Court refused to hear the evidence as to violations between April 27, 1940, and the filing of the suit. We think it would have been in order to hear whether the violations were continuing and *whether if they had ceased there was no purpose to renew them; but it is clear there had been recent violations, and there was still contention, and this was enough to ground the grant of injunction upon.*"

In the DOUGLAS case, the Circuit Court of Appeals for the Fifth Circuit held:

"The injunction was granted August 26, 1935, on the sworn bill of complaint and nothing has been since done by appellants to bring the cause to trial on its merits. *No answer has been filed, no testimony taken. The only facts we have are those the bill alleges. An appeal under such circumstances ordinarily brings up nothing for review but whether discretion has been abused.* Butler v. D. A. Schulte, Inc. (C.C.A.), 67 F. (2d) 632, 635."

In the SEARS, ROEBUCK & CO. case it was insisted that the injunction was improvidently issued because certain methods complained of had been discontinued before the complaint was filed and hearing held, it being further asserted that there was no intention of reassuming such methods. The Circuit Court of Appeals for the Seventh Circuit, notwithstanding these facts, and passing its opinion on the GOSHEN MFG. CO. case, supra, sustained the right of the Commission to the injunction, and held:

> "No assurance is in sight that petitioner, *if it could not shake respondent's hand from its shoulder would not continue its former acts.*"

In the WALLING case, the Circuit Court of Appeals for the Eighth Circuit held:

> "We cannot agree that the mere ex parte statements of defendants charged with violations of law, admitting the violations charged but asserting in general terms that after the suit was instituted defendants ceased their illegal practices and will not again be guilty of them, are sufficient to justify a court in entering a summary judgment in favor of defendants, * * * Moreover, the cessation of violations of law, under official pressure or after suit is brought by a public agency to restrain their continuance, does not alone render moot the issues in the case, nor in every case require of the district court in the exercise of its sound discretion the denial of a restraining order."

It is clear from the decisions above referred to that where a complainant's bill sets forth acts warranting injunctive relief and is supported by ample proof, and the defendants fail to answer and deny the allegations in the bill, and fail to controvert the proof offered, the Circuit Court of Appeals on an appeal from the injunction order of the trial court is not authorized to consider acts done by the defendants to remedy the situation *after* the filing of the complainant's bill.

In the instant case there was no hearing on the merits. The hearing was merely upon the matter of preliminary injunction—it consisted solely of petitioner's verified bill, the motions to dismiss and for summary judgment filed by the defendants, and numerous affidavits introduced by petitioner

which the trial court found "amply supported" all of petitioner's substantial allegations.

The *motive* actuating defendants was their desire to force petitioner to obey the maintenance of membership order. They persisted in that desire. The motive for their unlawful and harmful conduct has not been removed. Surely it was improper for the Circuit Court to remove the restraining hand of the trial court until the case is tried on its merit .

It is unquestionably clear that under the authorities set forth above the District Court properly determined petitioner's right to a preliminary injunction on the basis of facts existing on the date petitioner's bill was filed, and that the Circuit Court of Appeals erred, and therefore held contrary to these decisions, in dissolving the injunction on the basis of facts supposed to have arisen after the bill was filed in the trial court.

Conclusion

It is respectfully submitted that this is a proper case for the issuance of a writ of certiorari, and petitioner so prays in this Court.

Respectfully submitted,

Rex G. Baker
J. Q. Weatherly
Neth Leachman
John H. Crooker

REX G. BAKER,
J. Q. WEATHERLY,
c/o Humble Oil & Refining Company,
Houston, Texas;

NETH LEACHMAN,
Republic Bank Building,
Dallas, Texas;

JOHN H. CROOKER,
State National Bank Building,
Houston, Texas,

Counsel for Petitioner